

Tentative Rulings for October 12, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(2)

Tentative Ruling

Re: ***Serquina et al. v. Mata***
Superior Court Case No. 15CECG02765

Hearing Date: October 12, 2016 (Dept. 402)

Motion: terminating sanctions

Tentative Ruling:

To deny defendant's motion for terminating sanctions and monetary sanctions as to plaintiff Cecilia Gonzalez without prejudice.

Defendant has failed to fully and properly comply with Local Rule 2.1.17 prior to bringing this motion. The intent of the local rule is for the court to conduct a Pretrial Discovery Conference before a motion under sections 2016.010 through 2036.050, inclusive, of the California Code of Civil Procedure may be heard. The motion at bar is a motion under CCP §§2023.010, 2023.030, 2030.290(c) and 2031.300(c). The motion is not a motion to compel initial responses to interrogatories, request for production or request for admissions, thus does not fall within the exception to the local rule.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 10/11/16
 (Judge's initials) (Date)

(29)

Tentative Ruling

Re: **Rafael Ordaz v. Ogonna Onyeje, et al.**
Superior Court Case No. 15CECG03205

Hearing Date: October 12, 2016 (Dept. 402)

Motion: Demurrer

Tentative Ruling:

To sustain the demurrer to Plaintiff's first cause of action, as against each defendant, without leave to amend. To sustain the demurrer to Plaintiff's second cause of action, as to Defendant Onyeje, without leave to amend. To overrule the demurrer to the second cause of action as to Defendant Fortune.

Explanation:

Exhaustion of Administrative Remedies

Where an administrative remedy is provided by statute, regulation, or ordinance, a complaining party must exhaust the administrative remedy before turning to the courts. (*Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 99–100; see also *Parthemore v. Col* (2013) 221 Cal.App.4th 1372, 1379 [California state prisoner must exhaust available remedies prior to filing lawsuit].) Failure to exhaust applicable administrative remedies is a basis for demurrer. (*Gupta v. Stanford University* (2004) 124 Cal.App.4th 407, 411.) The State prison regulations provide for a multilevel administrative review process in resolving prison grievances. (Cal. Code Regs., tit. 15, §§ 3084.1 - 3084.7.) All prisoner appeals must go through the third level of appeal before the prisoner's administrative remedies are considered exhausted, and the prisoner is permitted to seek judicial relief. (*Id.* at §3084.1; see *Wright v. State* (2004) 122 Cal.App.4th 659, 664.)

Public Entity Liability

Generally speaking, a public entity is not liable for tortious injury unless liability is imposed by statute. (Gov. Code §815; see *Wright*, *supra*, 122 Cal.App. 4th at pp. 671-672.) The immunity provided by the California Tort Claims Act generally prevails over statutory liability. (*Ibid.*) Pursuant to the Tort Claims Act, each theory of recovery against a public entity must be included in a timely claim, and the factual circumstances set forth in the claim must correspond with the facts alleged in any subsequent complaint. (Gov. Code §§ 900 et seq., 945.4; *Castaneda v. Department of Corrections and Rehabilitation* (2013) 212 Cal.App.4th 1051, 1060.) “[A] claim need not contain the detail and specificity required of a pleading, but need only ‘fairly describe what [the] entity is alleged to have done.’ [Citations.]” (*Stockett v. Association of California Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 446.) To withstand a demurrer, the complaint should allege a factual basis for recovery that fairly reflects the

written claim; a complainant's more detailed version of the facts is not fatal as long as the complaint is not based on a wholly different set of facts. (*Id.* at p. 447.)

Though a public entity or employee is not liable for injury proximately caused by the failure to furnish or obtain medical care for a prisoner, a public employee or entity is liable where it is known, or there is reason to know, that a prisoner needs medical care and reasonable action to provide it is not undertaken. (Gov. Code §845.6; *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 288.)

Medical Malpractice

The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the alleged negligent conduct and injury; and (4) resulting loss or damage. (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968; see Civ. Code §3333.1(c)(2).)

Plaintiff's First Cause of Action

In the case at bench, Plaintiff alleges two causes of action. The first cause of action is alleged against Defendants Oneyeje, Chokatos, Fortune and Pascual, and is based on Defendants' alleged failure to properly diagnose and treat a skin condition suffered by Plaintiff for approximately five and one-half months. As discussed above, where an administrative remedy is available, it must be exhausted before a court can assert jurisdiction. Here, Plaintiff filed an administrative grievance dated January 28, 2015, in which Plaintiff alleges that Defendant Pascual misdiagnosed and mistreated clusters of small boils, blisters, and open sores, covering Plaintiff's back; Defendants Oneyeje, Chokatos and Fortune are not named or mentioned in the grievance. The institution's response states that Plaintiff's request that Defendant Pascual's misdiagnosis and malpractice be addressed was "granted" in that there was no misconduct and that Defendant Pascual followed protocol in Plaintiff's treatment; and Plaintiff's request to receive proper medical treatment and diagnoses was also "granted" in that Plaintiff received same from Defendant Pascual. (See FAC, Exh. A.) Though use of the term "granted" may have been somewhat misleading in this circumstance, it is clear that the institution's response to Plaintiff's grievance was that Defendant Pascual had acted properly and the institution had found no wrongdoing. Plaintiff chose not to appeal this decision, so his grievance went only to the first level of appeal. As the administrative remedy here was not considered exhausted until the third level of appeal, Plaintiff did not exhaust his administrative remedy against Defendant Pascual. The statute of limitation has run, so Plaintiff is time-barred from appealing to the second and third levels. Moreover, as the remaining defendants were not named in Plaintiff's grievance, Plaintiff is time-barred from alleging this cause of action against them. Accordingly, Defendants' demurrer to Plaintiff's first cause of action is sustained, without leave to amend.

Plaintiff's Second Cause of Action

Plaintiff's second cause of action, arising from the administrative grievance Plaintiff filed regarding post-operative care he received from Defendant Fortune, is

alleged against Defendants Oneyeje, Fortune and Monfore. It appears that Plaintiff has failed to serve Dr. Monfore with process, thus the Court lacks jurisdiction over Dr. Monfore.

Plaintiff's second administrative grievance stated that Plaintiff suffered complications immediately after surgery, that Plaintiff's wound dressing was not changed for two weeks, and that a hematoma developed at or near the surgery site. Plaintiff stated also that Defendant Fortune and the surgeon who performed Plaintiff's surgery failed to properly treat Plaintiff's hematoma and post-operative pain.

Any party not named in Plaintiff's grievance regarding his post-operative treatment cannot be named in the instant action, as Plaintiff has not exhausted his administrative remedies against such parties and the claims are now time-barred. Thus, Defendant Oneyeje's demurrer to Plaintiff's second cause of action is sustained, without leave to amend.

Plaintiff's second administrative grievance did name Defendant Fortune. This grievance was appealed through the third level. (See FAC, Exh. D.) Thus, Plaintiff has exhausted his administrative remedies as against Defendant Fortune regarding Defendant Fortune's post-operative care of Plaintiff.

Plaintiff alleges that Defendant Fortune (1) was Plaintiff's treating physician; (2) examined Plaintiff after Plaintiff's surgery and noticed bruising of the skin around the surgical site, as well as a large mass beneath the skin; (3) that Defendant Fortune did nothing about the mass, and did not change the dressing of the surgical site for two weeks, such that Plaintiff had to be taken to off-site emergency care, where he remained for three days; that at some point after the surgery, Plaintiff developed a methicillin-resistant staphylococcus aureus ("MRSA") infection; and that (4) the MRSA caused Plaintiff on-going excruciating pain. Plaintiff has sufficiently alleged his medical malpractice claim against Defendant Fortune. The Court notes that though all Defendants demur to each cause of action (see Dem., 1:26-28; 2:2-4), they also appear *not* to demur to Plaintiff's second cause of action as against Defendant Fortune. (See Dem., 16:3-4 ["This lawsuit should...be allowed to proceed only against Fortune on the second cause of action."].) If Defendants do demur to Plaintiff's second cause of action as against Defendant Fortune, the demurrer is overruled.

Judicial notice is taken as requested by Defendants.

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH **on 10/11/16**
 (Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***State of California, acting by and through the State
Public Works Board v. Nick's Trucking, Inc. et al.***
Superior Court Case No. 14 CECG 01958
Consolidated with Case No. 15 CECG 01351

Hearing Date: October 12, 2016 **(Dept. 402)**

Motion: Order for Possession of Parcel MF-IO-OO64-4

Tentative Ruling:

To deny the motion without prejudice.

Explanation:

On July 10, 2014, the Plaintiff filed a complaint in eminent domain pursuant to CCP § 1250.310 as Case No. 14 CECG 01958 in order to acquire property for the infrastructure of the California High Speed Train (CHST). The property at issue initially encompassed Parcel Nos. MF-10-0064-**1**; 10-0064-**2**; and 10-0064-**3**. According to the complaint, the property consists of 3.01 acres or 131,127 square feet. The property is located at 5185 North Golden State Boulevard, Fresno, California. A business known as "Nick's Trucking" involving demolition and debris hauling is operated on the property. On January 30, 2015, the State filed a motion seeking an order of possession pursuant to CCP § 1255.410(d). The motion was granted on May 5, 2015.

On April 29, 2015, the State filed a complaint in eminent domain as Case No. 15 CECG 01351 in order to acquire a temporary construction easement on Parcel No. MF-10-0064-**4**. See Complaint at page 3 lines 1-6. This case was consolidated with Case No. 14 CECG 01958 on May 29, 2015.

According to 7 *Miller & Starr California Real Estate* (4th Ed.) § 24:29:

Most government projects cannot be constructed by staying completely within the boundaries of the area permanently taken. Construction staging and access often require a temporary adjacent or nearby area to permit the project to be built. Temporary construction or work area easements are often included within the property taken. The condemning agency needs to specify the area to be taken, the purposes for which it will be used, **the time the easement will commence and the duration of the easement**. These easements **are usually valued** based on the fair rental value of the property taken for the time the area will be needed. [*Sacramento & San Joaquin Drainage Dist. v. Goehring* (1970) 197 13 Cal. App. 3d 58, 66] Under certain circumstances, the condemnee can recover severance damages for interference with the owner's use of the

remaining property. [*City of Fremont v. Fisher* (2008) 160 Cal. App. 4th 666, 676–677]

Here, the Complaint states at page 3 lines 23-24 that the easement will terminate not later than 6 months from the date that the State has taken legal possession of the property.

On July 11, 2016, Plaintiff filed a motion seeking an order of possession for Parcel No. MF-10-0064-4. The Declaration of Skinner states that on November 17, 2014, the State deposited with the State Treasurer the amount \$216,000, constituting the amount of probable compensation in this action. See ¶ 3. However, an examination of the Notice of Deposit and Summary of the Basis for the Appraisal indicates that \$216,000 is the amount of compensation for Parcel Nos. MF-10-0064-1; 10-0064-2; and 10-0064-3. See Declaration of Villegas at ¶12 attached to the Notice of Deposit. The moving party has not met its burden of showing that it will compensate the Defendant for the temporary use of Parcel No. **MF-10-0064-4**, or, in the alternative, that no compensation is necessary. The motion will be denied without prejudice.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH **on** 10/11/16
(Judge's initials) (Date)

Tentative Rulings for Department 403

(20)

Tentative Ruling

Re: ***Santos et al. v. Pacific Gas and Electric Company, et al.***,
Superior Court Case No. 15CECG01642

Hearing Date: **October 12, 2016 (Dept. 403)**

Motion: Plaintiffs' Motion to Determine Reasonableness of Charges
by Court Reporter

Tentative Ruling:

To grant in part and order that DCR Litigation Services provide to all parties certified copies of the depositions taken on June 23 and 24, 2016, at the rate of \$2.10 per page.

Explanation:

Initially, the court notes that DCR devotes much discussion in its opposition to the issue of personal jurisdiction over DCR, a non-party. DCR has waived any such objection making a general appearance and requesting relief from the court on its behalf. (Code Civ. Proc. § 410.50(a); see *Fireman's Fund Ins. Co. v. Sparks Const., Inc.* (2004) 114 Cal.App.4th 1135, 1145.)

DCR also argues that plaintiff's motion violates Code of Civil Procedure section 128.7. However, DCR never goes so far as to request sanctions under section 128.7, and even if it did request sanctions, DCR never followed the 21-day "safe harbor" procedure. The opposition's discussion of section 128.7 appears merely gratuitous.

A non-noticing party has a statutory right to obtain a copy of deposition transcripts and exhibits at a "reasonable rate." (Code Civ. Proc. § 2025.510, subd. (c); *Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, 1036.) The non-noticing party may challenge the "reasonableness" of the rate by motion in the court in which the action is pending. (*Id.* at p. 1020.) That court has authority to set the rate under its inherent authority to control the conduct of ministerial officers in pending actions in order to protect the administration of justice. (Code Civ. Proc. § 128, subd. (a)(5); *Serrano*, at p. 1029.) "[T]he court in the pending action is in the best position to resolve that dispute in a timely fashion. To defer the determination to a later separate proceeding would be impractical and inefficient and would undermine the trial court's necessary authority under section 128, subdivision (a)(5)...." (*Serrano, supra*, 162 Cal.App.4th at pp. 1038-1039.)

DCR falsely argues that its rates are lower than competitors. It provides rate sheets for three competitors (Exhibits 4-6), highlighting charges for originals plus a copy,

and implies that DCR's rate is lower. However, DCR clearly is not comparing apples to apples. The prices from these vendors for a certified copy are \$2.85 per page for Personal Court Reporters, and \$2.10 per page for Central Valley Reporters. The Atkinson Baker rate sheet does not state the price for a certified copy.) DCR's rate of \$3.95 per page for a copy of a deposition transcript is much higher, and the court finds it to be unreasonable. The court finds \$2.10 per page for a certified copy to be a reasonable rate.

The motion also challenges the fees charged for a copy of the video recordings of the depositions. However, section 2025.510(c) only addresses reasonableness of charges for the deposition transcript, not other charges. (See also *Serrano, supra*, 162 Cal.App.4th at p. 1038.) If plaintiffs want copies of the video recording, they will have to negotiate a price with DCR. However, the court will require that DCR make video reproduction services that were provided to PG&E, the noticing party, available to all parties on the same terms. Section 2025.320(b) requires that other services be made available to all parties.

Plaintiffs request attorneys' fees pursuant to Code of Civil Procedure section 1021.5. The request is denied. There is no significant benefit conferred upon the general public here. Plaintiffs and plaintiffs' counsel brought this motion to benefit themselves financially. They obtained no relief for anybody outside of this action. Plaintiffs also contend that the award of fees in this matter are justified based on the Court of Appeal's decision in *Serrano*. However, no attorneys' fees were awarded in that case, and the issues was not discussed.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 10/11/16
(Judge's initials) (Date)

(28)

Tentative Ruling

Re: ***Jenkins v. McDonald's Restaurants, et al.***

Case No. 16CECG00332

Hearing Date: October 12, 2016 (Dept. 403)

Motion: By Defendant McDonald's Restaurants of California, Inc. to strike claim for punitive damages from the Second Amended Complaint.
By Defendant McDonald's Corporation to strike claim for punitive damages from the Second Amended Complaint.
By Defendant McDonald's USA, LLC to strike claim for punitive damages from the Second Amended Complaint.

Tentative Ruling:

Each motion to strike is denied.

Explanation:

[The Court notes that no opposition or reply brief appears to have been filed with the Court.]

Defendants have filed what appears to be three identical motions to strike the allegations of punitive damages from Second Amended Complaint.

A motion to strike can be used to: "(a) Strike out any irrelevant, false, or improper matter inserted in any pleading"; or "(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." (Code Civ.Proc. §§ 431.10, subd.(b); 436, subd.(a).) A court will "read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Sup.Ct. (Pedus Services, Inc.)* (1998) 67 CA4th 1253, 1255.)

A motion to strike may lie where the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. (*Turman v. Turning Point of Central Calif.* (2010) 191 Cal.App.4th 53, 63.) Mere conclusory allegations will simply not suffice. (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.)

Punitive damages are governed by Civil Code §3294:

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Punitive damages are allowed, under appropriate circumstances, for both products liability and negligence cases. (See, e.g., *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1690-91 (intentionally marketing a defective product knowing that it might cause injury and death is "highly reprehensible" and justified punitive damages (citing *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738, 755); *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 898 (allowing punitive damages for non-intentional behavior, where there is reckless indifference).) Therefore, punitive damages are available for these causes of action, provided that Plaintiff pleads sufficient facts to render them appropriate.

According to the pleadings of the Second Amended Complaint, Plaintiff alleges that Defendants officers, directors, and managing agents ordered the serving of coffee to Plaintiff despite knowing that it was served at an unreasonably hot temperature (in excess of 175 degrees Fahrenheit). Plaintiff also alleges that Defendants served the coffee at such high temperatures despite having received over 1,000 complaints from customers regarding burned coffee and knowing that a certain percentage of their customers would have coffee spilled on themselves and suffer second and third degree burns.

Plaintiff also asserts that officers, directors, and managing agents of Defendants instructed their stores to use "substandard" coffee cups and lids despite knowing that the lids would easily fall off.

Defendants also argue that the described behavior does not rise to the level of “despicable” behavior required for punitive damages. While the behavior complained of here does not, perhaps, rise to the same level as in *Boeken*, disregarding warnings that customers may be subject to second and third degree burns when instructing employees and stores in how to handle products and packaging is certainly similar. (*Boeken, supra*, 127 Cal.App.4th at 1690-91 (reprehensible conduct includes conduct where “the tortious conduct evinced an indifference to or a reckless disregard of the health and safety of others” (quoting *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419)).) As a pleading matter, such conduct does approach the reprehensible conscious disregard that punitive damages are intended to deter. Therefore, the motion is denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Issued By: KCK on 10/11/16
(Judge's initials) (Date)

Tentative Rulings for Department 501

(30)

Re: ***The State of California v. Karen Boswell***
Superior Court No. 16CECG01113

Hearing Date: Wednesday, October 12, 2016 (**Dept. 501**)

Motion: Plaintiff's Motion for Possession

Tentative Ruling:

To Grant *subject* to the conditions outlined in Plaintiff's Reply filed: 9/27/16 and in the Declaration of Jorge Granados filed: 9/27/16, effective November 11, 2016 or 30 days after service of the order (per Code Civ. Proc., § 1255.450 (b)), whichever is later.

Explanation:

Code of Civil Procedure section 1255.410

A motion for a prejudgment order of possession is authorized by Code of Civil Procedure section 1255.410, which provides the statutory scheme for possession of property being sought in a condemnation action, prior to final judgment. This type of motion is often referred to as a "quick take" or a request for an Order for Immediate Possession ("OIP"). A quick take is permitted where a plaintiff (1) demonstrates that it is entitled to take the property by eminent domain and (2) has deposited an amount equal to the probable amount of compensation to be awarded to defendant.

(1) Code of Civil Procedure §1240.030

The plaintiff demonstrates entitlement to take the property via eminent domain by showing:

(1) the public interest and necessity require the project;

(2) the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and

(3) the property sought to be acquired is necessary for the project.

(Code Civ. Proc., § 1240.030.)

A resolution by the State Public Works Board conclusively establishes entitlement. (Codes Civ. Proc., §§ 1245.210(c) and 1245.250(a).)

Here, Plaintiff passed Resolution of Necessity No. 2014-0424 on January 15, 2016, conclusively establishing entitlement. (Granados Dec, filed: 7/11/16, Ex. A.)

(2) Code of Civil Procedure §1255.010(b)

The amount to be deposited by the plaintiff is based on an expert's appraisal. (Code Civ. Proc., § 1255.010(b).) The expert is to appraise the property, then prepare a written statement of the appraisal, containing sufficient detail to clearly illustrate the basis of the appraised value. (*ibid.*) Challenges to the sufficiency of the deposit are reserved for the jury. (*Metropolitan Water Dist. of Southern CA v. Campus Crusade For Christ* (2007) 41 Cal.4th 954, 965.)

Here, Plaintiff deposited \$104,200.00 with the State Treasurer on May 9, 2016. (Granados Dec, filed: 7/11/16 ¶ 4.) The amount was based on Michael Lockard's expert appraisal and submitted in a written statement which contains sufficient detail to clearly illustrate the basis of the appraised value. (Notice of Deposit, filed: 7/8/16.) Although Defendants oppose the valuation, proper compensation is an issue for the jury at a later stage. (Boswell Opposition, filed: 8/10/16 p3 Ins 5-7; Critchley Opposition, filed: 8/10/16 p1 Ins 25-26.)

Code of Civil Procedure section 1255.410(c)

A defendant may oppose the motion pursuant to Code of Civil Procedure section 1255.410(c), requiring an opposing defendant asserting a hardship to support its opposition with a "declaration signed under penalty of perjury stating facts supporting the hardship." (Code Civ. Proc., § 1255.410(c).) If the possession motion is opposed, the court may make an order for possession if it finds:

- (1) The plaintiff is entitled to take the property by eminent domain;
- (2) The plaintiff has deposited pursuant to Article 1 (commencing with Code Civ. Proc., § 1255.010) an amount that satisfies the requirements of that article;
- (3) There is an overriding need for the plaintiff to possess the property prior to the issuance of final judgment in the case, and the plaintiff will suffer a substantial hardship if the application for possession is denied or limited; and
- (4) The hardship that the plaintiff will suffer if possession is denied or limited outweighs any hardship on the defendant or occupant that would be caused by the granting of the order of possession.

(Code Civ. Proc., § 1255.410.)

Regarding factor three: Here, Defendant Boswell asserts her arguments via conforming declaration and her supporting memorandum. (Boswell Dec, filed: 8/10/16; Boswell Opposition, filed 8/10/16.) She argues that there is no need for Plaintiff to possess the property prior to judgment because "there has not been any work completed within twenty (20) miles of the Defendant's property," so it is a "clear overstatement that any hardship will be suffered in delay of the construction of improvements to the Defendant's property" if possession is not ordered before November 11, 2016. (Boswell Opposition, filed 8/10/16 p2 Ins 13-17 and p4 Ins 9-15; Boswell Dec, filed: 8/10/16 ¶ 8.) First, it is unclear why Defendant Boswell is using November 11, 2016 as a reference

point as no trial date has even been set. Further, Defendant Boswell fails to consider Plaintiff's arguments that delay could (1) result in the loss of significant funding necessary to complete the project; (2) impact the Design Builder's ability to construct the project in an efficient fashion as required under the design-build method; and (3) expose the Authority to potentially substantial delay damage claims under the construction contract. (Reply, filed: 9/27/16, lns 16-23; Granados Dec, filed: 7/11/16 ps2-3.) Ultimately, Plaintiff demonstrates an overriding need to possess the property before final judgment.

Regarding factor four: Here, Defendant Boswell asserts that her hardships outweigh Plaintiff's. She will suffer a total loss of the ability to irrigate the property, restricted road access, and damages related to an indemnity clause in the lease with Defendant SC Critchley, Inc. She also asserts that the taking will negatively affect the waste water agreement with the nearby Dairy. (Boswell Dec, filed: 8/10/16 ¶ 4; Boswell Opposition, filed: 8/10/16 p3 lns 22-28.) Defendants Critchley and SC Critchley, Inc.'s objections are parallel to those asserted by Defendant Boswell. (Critchley Dec, filed: 8/10/16.) Plaintiff submits no reply in opposition. Instead, Plaintiff concedes to Defendants.

First, a road will be constructed connecting E. Clarkson Avenue with S. Minnewawa Avenue which will allow Defendants access, preventing land-lock. (Granados Dec, filed: 9/27/16 ¶ 4.) Plaintiff also agrees to allow Defendants to keep their agricultural well, standpipe, and main irrigation pipe for the irrigation facilities in place and operable until a replacement is developed, installed, and is operational. In addition, Plaintiff agrees to allow the dairy waste water pipes to stay in place and operable until a replacement is developed, installed, and is operational. Plaintiff agrees not to interrupt service from any well, connection to it, or waste water pipes, without seven (7) days advance notice to Defendant(s) and any single interruption in service shall be limited to no more than 4 hours. Plaintiff requests that the replacement of any agricultural well, connection to it, and/or waste water pipe located within the Property shall be requested by Defendants within sixty (60) days of the date this Order is signed by the Court and completed by February 1, 2017. Also, within 30 days of this order, Defendant(s) shall provide an irrigation plan or diagram to the Authority, showing the location of any well, irrigation pipes, drip lines, or waste water pipes within the Subject Property and/or on the remainder affected property. Last, Defendants shall be responsible for the design, placement, construction and relocation of any well, irrigation pipe, drip lines, and waste water pipes located within the Property. This work will be paid for by Plaintiff after completion, with payment made as part of the payment of just compensation in this proceeding. (Reply, filed: 9/27/16 pgs 2-3; Granados Dec, filed: 9/27/16 ¶ 6.) Plaintiff requests This Court grant an Order of Possession *subject* to the above conditions, effectively mooted Defendants' hardship objections. (Reply, filed: 9/27/16 p3.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 10/11/16
(Judge's initials) (Date)

(20)

Tentative Ruling

Re: ***Peredia v. HR Mobile Services, Inc., et al.***
Superior Court Case No. 13CECG03137

Hearing Date: **October 12, 2016 (Dept. 501)**

Motion: Plaintiffs' Motion to Tax Costs of Defendant HR Mobile Services, Inc.

Tentative Ruling:

To grant in part and tax costs by \$1,703.01. Total costs to be recovered by defendant HR Mobile Services, Inc., are reduced from \$15,142.96 to \$13,439.95.

Explanation:

The losing party may dispute any or all of the items in the prevailing party's costs memorandum by a motion to strike or tax costs. (See Cal. Rules of Court, Rule 3.1700(b).)

The bulk of the motion is based on the contention that any costs for discovery not specifically necessary for the discrete ground on which summary judgment was granted was not reasonably necessary, and such costs should be denied. No costs will be taxed on this ground, for which plaintiffs cite to no supporting authority. It would be unwise for a party to pursue discovery, and file a summary judgment motion, based on a single issue discrete issue, ignoring other potentially important issues. Nor will costs be denied because the motion for summary judgment was not filed earlier in the litigation, as piecemeal summary judgment motions are not favored.

However, the court will tax the following deposition-related costs totaling \$1,343.01, as they are not specifically allowed by Code Civ. Proc. § 1033.5(a)(3)(A):

- Ruff deposition:
 - \$77 Rough ASCII Disk
 - \$60 and 106.75 unexplained fees of
 - \$25 litigation support package
 - \$40 exhibits with tabs
- Oscar and Laura Peredia:
 - \$25 litigation support package
 - \$2 for exhibits with tabs,
 - \$737.26 for expedite of transcripts
 - \$23 for separate disk,
 - \$25 for a second litigation support package,
 - \$89.25 for a three day expedite,
 - \$113 for another separate disc,
 - \$25 for another litigation support package and
 - \$31.50 for exhibits with tabs again.

- Coroner Arguelles:
 - \$40 for ASCII disc
- Sheriff Chavez:
 - \$30 for ASCII disc

The interpreter fee of \$360 for the 6/2/16 deposition of Laura Peredia is taxed, as the deposition did not occur on that date. HR does not address this cost in its opposition.

In the introduction section of their memorandum (MPA 2:11-20), plaintiffs say that certain travel costs are partially substantiated but no backup has been provided for others. However, plaintiffs do not specifically identify the costs that are not substantiated, and do not address these costs in the discussion section of the memorandum. Since the memorandum does not clearly identify the costs at issue, the court will not tax these costs. Additionally, with the reply HR itemizes and submits documentation in support of the various travel costs. (See Kavar Reply Dec. ¶ 7.)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 10/11/16
(Judge's initials) (Date)

Tentative Ruling

Re: **State of California v. JHS Family Limited Partnership, et al.**
Superior Court Case No. 16CECG01714

Hearing Date: October 12, 2016 (Dept. 501)

Motion: By the State of California, acting by and through the State Public Works Board, for Prejudgment Possession of Property against JHS Family Limited Partnership, et al.

Tentative Ruling:

To take off calendar.

Explanation:

The parties filed a Stipulation for Order for Prejudgment Possession, and Proposed Order on October 4, 2016, which the Court signed on October 11, 2016. The Stipulation appears to dispose of the motion entirely, so the motion is taken off calendar.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 10/11/16
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***State of California v. Lamoure's Incorporated***
Court Case No. 16CECG00653

Hearing Date: **October 12, 2016 (Dept. 501)**

Motion: Defendant's Motion to Compel Further Responses to Discovery and for Monetary Sanctions

Tentative Ruling:

To deny defendant's motion to compel further responses to Form Interrogatories, Set One, except as to Form Interrogatory No. 17.1. As to that interrogatory, plaintiff is ordered to respond.

To grant defendant's motion to compel further responses to Special Interrogatories, Requests for Admission, and Requests for Production of Documents (all Set One), with the scope of the Special Interrogatories modified as explained below.

Plaintiff shall serve verified responses to all of Defendant's written discovery, without objections, and produce all responsive documents to the above-mentioned discovery no later than 20 court days from the date of this order, with the time to run from the service of this minute order by the clerk.

To grant defendant's request for sanctions against plaintiff in the amount of \$1,985, payable within 30 calendar days, with the time to run from the service of this minute order by the clerk.

Explanation:

The motion was timely, as to all discovery sought to be compelled. Plaintiff completely refused to cooperate with defendant's meet and confer efforts, including failing to respond to defendant's request for a pretrial discovery conference. Plaintiff's argument that it is excused from meet and confer because defendant wrote a strongly worded initial letter is not well taken. It is part and parcel of the meet and confer response for the party demanding the discovery to contend that it is correct in its position. Plaintiff made no attempt at making any reasonable proposals in response, which would have been the true test of defendant's own reasonableness in its posture. Defendant's meet and confer was adequate in the face of plaintiff's complete refusal to participate in the process.

Important Considerations Relative to Eminent Domain:

Defendant has challenged plaintiff's right to take its property by challenging the validity of the Resolution of Necessity, arguing that no offer required by Section 7267.2 of the Government Code was made, as required by Code of Civil Procedure section 1245.230, subdivision (c)(4). The court's ruling on plaintiff's motion for prejudgment

possession was denied without prejudice, and the court has not yet made a final determination on the issue of its validity.

Except as otherwise provided by statute, the Resolution of Necessity is conclusive on the matters referred to in Code of Civil Procedure section 1240.030. Those three matters are as to: 1) the public necessity of the project; 2) that the project is planned/located in a manner most compatible with greatest public good and least private injury; and 3) that the property acquisition is necessary for the project. (Code Civ. Proc. § 1245.250, subd. (a).) However, a Resolution of Necessity does not have the effect prescribed by section 1245.250 as to those three factors "to the extent that its adoption or contents were influenced or affected by gross abuse of discretion in the governing body." (Code Civ. Proc. § 1245.255, subd. (b).)

The property owner may challenge the validity of the Resolution of Necessity (and thus challenge the condemnor's right to take) by writ of mandate before the eminent domain action is filed, or by objection to the right to take after it is filed. (*Id.*) "A gross abuse of discretion occurs where the public agency acts arbitrarily or capriciously, renders findings that are lacking in evidentiary support, or fails to follow the required procedures and give the required notices before condemning the property." (*City of Stockton v. Marina Towers LLC* (2009) 171 Cal.App.4th 93, 114.) "It may also be shown where at the time of the agency hearing, the condemnor had irrevocably committed itself to the taking of the property regardless of the evidence presented." (*City of Saratoga v. Hinz* (2004) 115 Cal.App.4th 1202, 1221.)

Where objections to the right to take are raised, as here, they must be heard and determined prior to the determination of just compensation, unless the court orders otherwise. (Code Civ. Proc. § 1260.110, subd. (a).) The Law Revision Comment to section 1260.110 states: "Under subdivision (a), disposition of the right to take is generally a prerequisite to trial of the issue of just compensation. *However, this does not preclude such activities as depositions and other discovery....*" (*Id.*, emphasis added.)

On motion of any party, the court may specially set a defendant's objections to the right to take for trial. (*Id.*, subd. (b). Cal. Rules of Court, Rule 3.1335.) Eminent domain proceedings are entitled to trial setting preference over all other civil actions, and such proceedings shall be quickly heard and determined." (Code Civ. Proc. § 1260.010.)

Merits of the Motion:

Discovery provisions related solely to eminent domain proceedings are found at Code of Civil Procedure, sections 1258.010-1258.300. These are primarily concerned with the exchange of expert witness information and valuation data. However, these provisions supplement and do not replace, restrict or limit the discovery provisions available in civil actions generally. (See 8 Witkin, Summary 10th Const. Law § 1211.)

Plaintiff failed to provide any support for its contention that the court's standard of review at the trial of this issue (i.e., limited to the administrative record) serves to provide a limit on defendant's discovery. Therefore, this argument is unpersuasive.

Defendant contends, and seeks to establish with this discovery, that: 1) plaintiff never made a good faith determination regarding what would constitute just compensation for the subject property; 2) plaintiff never made an offer for the property equal to that amount (both of which are required by Government Code section 7267.2); and 3) that despite its failure to comply with those requirements, the Public Works Board adopted a resolution of necessity which falsely stated that plaintiff had complied with Section 7267.2, opening the door for plaintiff to file suit. Defendant does not appear to contest plaintiff's (correct) contention that trial on the issue will be limited to the court's review of the agency's proceedings. ((*Santa Cruz County Redevelopment Agency v. Izant* (1995) 37 Cal.App.4th 141, 150.) But defendant contends it has the right in attempting to invalidate the Resolution of Necessity to seek discovery that will help it prove that the Board's adoption of the Resolution based on (*inter alia*) the supposed fact that an offer pursuant to section 7267.2 had been made, was in fact false. "A gross abuse of discretion may be shown by a lack of substantial evidence supporting the resolution of necessity." (*Redevelopment Agency of City of Chula Vista v. Rados Bros.* (2001) 95 Cal.App.4th 309, 316, *as modified on denial of reh'g* (Jan. 7, 2002), *as modified* (Jan. 15, 2002), internal quotes and citation omitted.) Defendant is entitled to discovery on these issues.

However, as to the Form Interrogatories, the definition of the term "incident" is unclear on its face, and defendant's explanation of what it meant by its definition (in its meet and confer letter) is overbroad. Defendant defined this term as meaning the "facts and circumstances and events described in your complaint on file in this action," but told plaintiff this meant "the sequence of events that transpired over the course of the past few years between plaintiff and Lamoure's involving plaintiff's appraisals, updates and 'offers' as it attempted to acquire Lamoure's property." First, the complaint does not "describe" the "sequence of events" which transpired over the course of several years. Therefore, anyone attempting to answer the interrogatories based on this definition would understandably be confused. Second, attempting to define this term as encompassing "the past few years" is simply too uncertain in scope, and is overbroad. Defendant's motion to compel responses to the Form Interrogatories is denied, without prejudice to defendant's right to ask valuation questions at the appropriate time.

The only exception is as to Form Interrogatory No. 17.1, related to the Requests for Admission. Plaintiff's argument that the page on which this interrogatory was located was not served on it is not persuasive. It could easily have notified defendant of this, and furthermore once defendant was told about this, it promptly provided another full set of this discovery and gave plaintiff additional time to respond. As plaintiff is being ordered to respond to the Requests for Admission, this related interrogatory must also be answered.

As to the Special Interrogatories, plaintiff's objections are, at least in part, well taken. To the extent defendant is attempting to force plaintiff to "tell defendant what plaintiff will pay for the property" (which is what defendant argued on this motion) this again goes to the issue of just compensation and is premature at this juncture. Even so, to the extent these interrogatories relate to the issue of the previous offer of probable

compensation given to Defendants prior to the adoption of the resolution of necessity, this is the subject of defendant's challenge to plaintiff's right to take and defendant is entitled to discovery. Plaintiff is ordered to answer all the Special Interrogatories, but with the focus of each query being narrowed to the point in time of plaintiff's previous "offer" of probable compensation (i.e., what plaintiff contends is an offer, and what defendant contends is not).

As for the Requests for Admissions, it is critical to understand the function of this type of discovery. As the California Supreme Court stated in *Cembrook v. Superior Court In and For City and County of San Francisco* (1961) 56 Cal.2d 423:

Most of the other discovery procedures are aimed primarily at assisting counsel to prepare for trial. Requests for admissions, on the other hand, are primarily aimed at setting at rest a triable issue so that it will not have to be tried. Thus, such requests, in a most definite manner, are aimed at expediting the trial. For this reason, the fact that the request is for the admission of a controversial matter, or one involving complex facts, or calls for an opinion, is of no moment. If the litigant is able to make the admission, the time for making it is during discovery procedures, and not at the trial.

(*Id.* at p. 429.)

Therefore, plaintiff's objections based on premature disclosure of expert opinion and attorney work product are unavailing. As the court noted in *Chodos v. Superior Court for Los Angeles County* (1963) 215 Cal.App.2d 318, where it is clear from the facts set forth in the moving papers from which it may be inferred that the responding party has available to it sources of information as to the matters involved, "it is neither unfair nor improper to require the [responding party] to make such reasonable investigation as they may deem needed in order for them to determine now that, when the trial is held, they will, or they will not, dispute the matters involved." (*Id.* at p. 323, brackets added.) It can be readily inferred from the facts set forth on this motion, as well as the facts revealed in the moving and opposition papers on plaintiff's motion for possession, that plaintiff has sources of information available to it to respond to the Requests for Admission. It is ordered to respond to this discovery.

As for sanctions, these are mandatory against the party who loses the motion to compel responses to discovery unless the court finds that the party acted "with substantial justification" or other circumstances that would render sanctions "unjust." (Code Civ. Proc., §§ 2030.290, Subd. (c) [Interrogatories], 2031.300, Subd. (c) [Document demands], and 2033.280, Subd. (c) [Requests for admissions].) Unless a valid excuse is shown, the court apparently may not refuse to impose the monetary sanction. Further, the burden is on the losing party to prove such excuse. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1441—losing party presumptively must pay monetary sanction to prevailing party.) Defendant did not entirely prevail on this motion, as some of the discovery was objectionable. To that extent, plaintiff's objections were justified. However, it is clear that this motion was necessary to force any meaningful response. Furthermore, plaintiff's refusal to participate in the meet and confer process was entirely unjustified. Some imposition of monetary sanctions against

plaintiff is just, to compensate defendant for some of the fees it incurred in being required to make this motion. The court orders sanctions in the reduced amount of \$1,985, which includes the cost of the filing fee.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 10/11/16
(Judge's initials) (Date)

Tentative Rulings for Department 502

03

Tentative Ruling

Re: **Navarro v. Sierra Meadows Senior Living LLC**
Case No. 15 CE CG 03127

Hearing Date: October 12th, 2016 (Dept. 502)

Motion: Defendant Donna Hurley's Motion for Summary Adjudication

Tentative Ruling:

To deny defendant Donna Hurley's motion for summary adjudication of the defamation cause of action. (Code Civ. Proc. § 437c.)

Explanation:

First, both parties have raised procedural objections to each other's briefs. Defendant complains that plaintiff's opposition brief was filed in an untimely manner, as the parties agreed to keep the original filing deadlines for the opposition and reply even though they continued the hearing date for the motion. However, while plaintiff's opposition brief was filed one day late under the original briefing schedule, defendant was still able to file a reply brief that addressed the merits of the opposition, and thus defendant has waived the objection regarding the delay. In any event, it does not appear that there was any prejudice to defendant from the late filing, particularly since the hearing was continued for several weeks and defendant had ample time to respond to the plaintiff's opposition. Therefore, the court will not disregard plaintiff's opposition based on lack of timeliness.

Plaintiff has also objected to defendant's motion on procedural grounds, claiming that the motion is defective because it does not have a separate document labeled "Summary of Evidence." (Cal. Rules of Court, Rule 3.1350, subd.'s (c)(4), (g).) However, Rule 3.1350, subdivisions (c)(4) and (g) only require that a party moving for summary judgment submit evidence in support of the motion, and that the evidence be in a separately bound document with a table of contents if more than 25 pages of documents are submitted. The separately bound document does not have to be labeled as a "Summary of Evidence" as plaintiff contends.

Here, the defendant's motion does include evidence to support the motion, most of which is attached to the declaration of Howard Sagaser as well as a separate declaration of Donna Hurley. While the Sagaser declaration does not include a table of contents, there are only three exhibits attached to the declaration, and the amount of pages is not so great that the lack of a table of contents makes it unduly difficult to review the evidence. In fact, there are only about 21 pages of evidence submitted, including the declaration of Donna Hurley, which is not even enough to trigger the

requirement for a table of contents. Therefore, there is no basis for denying the motion based on the lack of a separate document labeled "Summary of Evidence."

Next, with regard to the merits of the motion, defendant Hurley argues that plaintiff cannot prove her defamation claim because there is no evidence that she made any defamatory statements or communications to third parties, that there is no evidence that she made any statements with malice, and that any statements that she did make were true and/or privileged.

"The tort of defamation 'involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.' [Citations.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.)

"Publication is a necessary element of all defamation claims, and includes every repetition and distribution of a defamatory statement." (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 45.)

"[A] cause of action for defamation accrues at the time the defamatory statement is 'published' (using term 'published' in its technical sense)." (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1247.) "[I]n defamation actions the general rule is that publication occurs when the defendant communicates the defamatory statement to a person other than the person being defamed." (*Ibid.*)

Here, defendant contends that plaintiff has only alleged two defamatory communications: statements made by defendant during a staff meeting about the reasons for plaintiff's suspension, and an email that was sent to plaintiff's new employer which accused her of filing multiple lawsuits against her employers and of being a drug addict who cheats on her drug tests.

With regard to the email, defendant denies that she sent the email to plaintiff's new employer, or that her email address is joeyloera10@gmail.com, the address from which the email was sent. (Hurley decl., ¶ 6.) Thus, defendant contends that plaintiff cannot prove that she made the defamatory statements in the email.

However, the court has discretion to deny summary judgment if the only evidence to support a material fact in support of the motion is an affidavit or declaration made by an individual who was the sole witness to that fact. (Code Civ. Proc., § 437c, subd. (e).) Here, the only evidence submitted by defendant in support of her undisputed material facts numbers six and seven is defendant's own self-serving declaration. There is no other evidence that Hurley did not send the email, or that she did not own or create the email address from which the email was sent. Thus, the court intends to disregard defendant's denials as unsupported by any other evidence. Without defendant's declaration regarding the email, there is nothing to support two of defendant's material facts, and the motion must be denied.

Defendant claims that plaintiff herself admitted in her deposition that she did not know who sent the email. (Defendant's UMF No. 8.) While it is true that plaintiff apparently has no direct evidence that defendant sent the email, plaintiff does submit

some evidence suggesting that defendant might have had a motive to send the email, and that the email was not sent by her boyfriend, Jose Loera, despite the fact that the email was sent from an account bearing his name. Jose Loera himself denies sending the email, and claims that he did not create the address and the address does not belong to him. (Loera decl., ¶¶ 2, 3.)¹ He does not know who created the email address. (*Id.* at ¶ 3.) The IP address for the email is not the same as Loera's IP address, and the birth date given for the account does not match his birth date. (*Id.* at ¶¶ 4, 6.) He did not even know where plaintiff was working or the name of her boss to whom the email was sent. (*Id.* at ¶ 5.)

Also, the email was sent about two months after plaintiff told Hurley that she had filed a complaint with the State about allegedly unsafe practices at Bella Vista, and a few weeks after Hurley first learned that plaintiff intended to sue Bella Vista. (Exhibit 31 to Exhibit "D" to Whitten Dec., Navarro DT, Exhibit "F" to Whitten Dec., Hurley depo. 43:9-15; Exhibit "E" to Whitten Dec., Cox depo. 69:1 1-17; Exhibit 67 to Exhibit "F" to Whitten Dec., 13229-19.) Plaintiff had not told anyone else that she had a lawyer or was intending to file a lawsuit. (Exhibit "D" to Whitten Dec., Navarro depo. 254:11-25, 255:9-15, 262:14-25.) Hurley had indicated that she would be able to find plaintiff if she left to work for someone else, which implies that she might have been able to locate plaintiff's new employer and send an email to him. (Exhibit 53 to Exhibit "F" to Whitten Dec., Hurley depo. 48:7-13.) Hurley also uses Gmail for her personal email. (Exhibit "F" to Whitten Dec., Hurley depo. 14:3- 7.) In addition, Hurley was unable to produce her laptop or phone for examination because they were allegedly stolen from her car before she could produce them. (Exhibit "F" to Whitten Dec., Hurley depo. 17:3- 20; Exhibit 45 to Exhibit "E" to Whitten Dec., Cox depo.)

Thus, there is some evidence from which a reasonable jury could infer that Hurley might have had a motive to defame plaintiff to her new employer, that she knew or could find out who the new employer was, and that she took steps to make sure that the email could not be traced back to her by creating a false email account and then disposing of her phone and laptop. While there is no direct evidence that Hurley sent the email, the evidence is sufficient to create a triable issue as to whether she might have been the one who sent it. Hurley's own self-serving denials are not enough to support granting the motion without some other evidence that supports her denials.

In her reply, defendant submits the declaration of Jerry Carter, plaintiff's boss at Excelsior Lighting, who states that he did not fire plaintiff because of the email, and in fact it was plaintiff who quit a few days after the email was received because she did not feel comfortable working at Excelsior. (*Id.* at ¶¶ 3-5.) Defendant contends that Carter's statements demonstrate that there was no causal link between the email and plaintiff's termination, and thus she cannot prevail on her claim. However, the court cannot consider the newly filed declaration, as it would be a denial of due process to allow defendant to obtain summary adjudication based on evidence submitted with the reply without giving plaintiff a chance to respond to it. (*San Diego Watercrafts, Inc.*

¹ Defendant objects to Loera's declaration on the grounds of relevance and failure to authenticate the email, but the court intends to overrule the objections.

v. Wells Fargo Bank, N.A. (2002) 102 Cal.App.4th 308, 316.) Therefore, the court intends to disregard Carter's declaration and deny the motion for summary adjudication.

Pursuant to CRC 3.1312 and CCP § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 10/11/16
(Judge's initials) (Date)

Tentative Rulings for Department 503